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SUPREME COURT, U S

No. 6341

IN THE

Supreme Court of the United States

October Term, A. D. 1957

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPORTING BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Amicus Curiae.

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SUPPORTING BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

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The Interest of The National Industrial Traffic League.

The National Industrial Traffic League is a nationwide association of shippers of practically every kind and category of traffic transported by railroads and motor carriers or others. The organization is dedicated to the promotion of sound economic transportation.

The League has a continuing interest, broadly speaking, on behalf of its members in correct principles affecting the rights of shippers and the rights and duties of common carriers in respect of shipments of goods. It is concerned, therefore, with decisions of the courts, interpreting the statutes or defining the law as to respective liabilities of the carrier and of the consignor, where any loss, damage or injury occurs.

The membership of the League in recent annual convention, regarding this case as of very general public importance, authorized and directed intervention in proper

fashion to inform the Supreme Court of the gravity and widespread effect of the basic error of the Court of Appeals. The sole interest of the League is in a correct definition of the obligation of the consignor of a shipment to the common carrier and the absence of any absolute warranty such as laid down by the Court below.

The matter is argued in defendants' petition for writ of certiorari and in supporting briefs of other *amicus curiae* so fully that repetition in this brief should be saved.

I. The Common Carrier's Obligation.

Under their general obligation to receive and transport freight shipments, common carriers by highway and by railroad are specifically required by the terms of the Interstate Commerce Act, Sec. 20(11), to issue bills of lading in form which has been prescribed by the Interstate Commerce Commission and are liable for the full actual loss resulting from their negligence. By common law such carriers are, generally speaking and with certain exemptions, insurers of the goods. It is their right and privilege, however, to refuse acceptance of proffered shipments which are not properly packed, marked and prepared for transportation in accordance with established rules and common usage. The consignor has the duty of using proper containers, as reasonably required for the safe movement and delivery of the goods with reasonable care by the carrier; and if the packages or containers are patently deficient or faulty or defective, the carrier should refuse acceptance. These general statements are the commonly accepted practice and custom in present-day transportation by common carriage.

Specifically as to motor common carriers, the National Motor Freight Classification which provides the rules and regulations commonly governing the freight rate tariffs and the services, contains a so-called packing rule which requires that barrels, drums and so forth, in which ship-

ments (not inherently dangerous articles) are contained must be such "as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods".

II. The Decision of the Court of Appeals.

The Court of Appeals for the Second Circuit quotes the aforesaid packing rule; it briefly states the facts of this case; and the Court holds in substance and effect that the duty of the consignor is absolute, that defendant had breached an implied warranty existing under common law as recognized by the packing rule, so that the degree of care exercised by the consignor in packaging and preparation of the shipment is irrelevant. The Court applies its concept of the common law of bailments generally, distinguished (as we see it) from consideration of the common law governing carriers and shippers of freight in their respective rights and obligations.

The Court's opinion cites three cases bearing on its ruling of absolute duty of the consignor, with one of which its opinion is entirely inconsistent and the others have no apparent relation—event remotely—to the matter of common carrier obligation in the transportation of goods.

The Court of Appeals of New York in the cited case of *Hoisting Engine Sales Co., Inc.* v. *Hart*, 273 N.Y. 30, 142 N.E. 342, in considering the rights and obligations of bailors and bailees quoted an early English authority and held an implied warranty "that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it". Thus, when analyzed, the decision cited appears flatly inconsistent with the holding herein of breach of absolute warranty as to which "the degree of care exercised by the defendant is irrelevant".

The further citations *Overbury* v. *Platten*, 108 F. 2d 155, and *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612, do not appear to have the slightest application to the matter of

common carrier rights and liabilities respecting shipments, and any significance they may have for purposes of the present case completely escapes us.

Counsel for the League has not discovered any reported cases involving the law of common carriers which tend to support the theory and holding of the Court of Appeals.

On the other hand, there are many authorities, which, although not directly dealing with the present sort of controversy or precise question, are necessarily inconsistent with any holding of absolute warranty of a consignor concerning the quality of the container in which a shipment is offered and received by the common carrier.

III. Conflict with Decisions in Other Circuits.

The decision of the Appeals Court herein appears inconsistent with the decision of the Court of Appeals for the Third Circuit in *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161 (1948). That was simply an action for recovery of damages for loss of liquid goods in barrels which may have been defective. The Court holds the common carrier is strictly accountable under common law as an insurer and absolutely liable for loss, without regard to the exercise by the carrier of due care or of any lack of proof of negligence against the carrier. Clearly on the facts of the case the Court considered there was no implied or absolute warranty by the consignor.

The Circuit Court of Appeals for the Eighth Circuit in *Hover & Co.* v. *D. & R.G.W. R. Co.*, 17 F. 2d 56 (1927) considered the loss of goods through leakage in transit and held that in order to warrant a recovery by the carrier against the shipper for damages alleged to have been caused by consignor's failure to comply with regulations specifying the containers required to be used, it is necessary to prove that failure to fulfill such obligation caused the injury. This holding and the court's reasoning seem distinctly inconsistent with the theory of warranty by the consignor adopted by the Appeals Court in the present case.

IV. The Theory of Absolute Warranty Is Unique.

The decision of the Court of Appeals is attracting widespread attention of shippers and carriers as changing the common law rule and long-standing general practice and usage under which the shipper in tendering package goods represents in substance that the packages or containers are "of such strength as to afford safe handling, reasonable and proper protection of contents and against damage to other goods when transported with reasonable care and without negligent handling." The court goes so far as to hold that "the degree of care exercised by the defendant [consignor] is irrelevant." Questions of negligence of consignor or carrier and of actual fitness of the containers and packaging are issues of facts for the jury. We respectfully urge that there should be no basis in a final court decision for imposing against consignors a new and novel absolute warranty of the containers and packaging such as here pronounced by the Court of Appeals for the Second Circuit.

Counsel representing The National Industrial Traffic League now respectfully suggest and urge that the Court grant the writ of certiorari prayed for by defendant below in its petition filed December 3, 1957; and upon review the decision of the Court of Appeals should be reversed on the grounds set forth in defendant's petition.

Respectfully submitted,

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